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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date:

Office: CALIFORNIA SERVICE CENTER

FILE:



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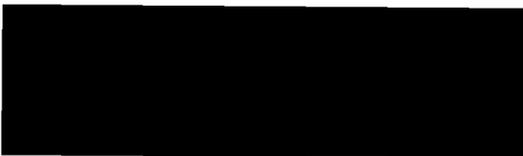
Petitioner:

Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael T. Kelly
for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition, and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition the petitioner stated that it is a real estate firm with three employees. The petitioner left blank the spaces provided for it to report its net and gross annual incomes. To employ the beneficiary in what it designates as a computer support specialist position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

An Illinois attorney signed the visa petition, indicating that he had prepared it for the petitioner. A Form G-28 entry of appearance submitted with the visa petition indicated that the petitioner then consented to be represented by that attorney. That same attorney submitted a reply to a request for evidence (RFE) issued in this matter. The appeal in this matter was submitted by a Michigan attorney, along with a Form G-28 properly executed by the petitioner indicating consent to her representation. All submissions will be considered, but the decision in this matter will be issued only to the petitioner and the petitioner's present counsel of record.

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner's present counsel asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements.

As will be discussed below, the AAO has determined that the director's determination to deny the petition on the specialty occupation issue was correct. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed, and the petition will be denied.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's RFE; (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and present counsel's brief in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would employ the beneficiary in a specialty occupation position.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge,
and

- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which requires [(1)] theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires [(2)] the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The Form I-129 Supplement H, signed by the petitioner's owner, contains the following description of the duties of the proffered position, "Perform duties and functions as a computer support specialist including but not limited to troubleshooting computer[-]related issues." No other description of the duties of the proffered position was submitted with the visa petition.

On August 17, 2009, the service center issued an RFE in this matter. The service center requested, *inter alia*, a more detailed list of the duties of the proffered position and evidence that the petitioner would employ the beneficiary in a specialty occupation.

In response, previous counsel submitted a more detailed list of the duties of the proffered position, and a single vacancy announcement posted by another company. The vacancy announcement provided will be addressed later in this decision.

The more detailed description of the proffered position provided is on the petitioner's letterhead, but unsigned and unattributed.¹ The duties it describes are as follows:

1. responsible for technical support for users and customers
2. analyze data, diagnose and troubleshoot technical problem[s]
3. provide technical support for hardware and software as needed
4. implement new programs that are user friendly in order to assist users and clients
operate the programs
5. modify hardware and software as requested in order to meet customer demands and satisfaction
6. answer phone calls and inquiries from clients as needed
7. install, configure and manage network for the company
8. maintain all users connected to the network effectiveness [sic]

¹ Who generated the list of duties provided in response to the RFE, and their basis for asserting that the list is an accurate description of the duties of the proffered position, are both unclear. The AAO will assume, *arguendo*, that an official of the petitioner generated it based on personal knowledge. The AAO observes, however, that if counsel generated that list, then it would be precluded from consideration, as the assertions of counsel are not evidence and are not entitled to any evidentiary weight. See *INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Unsupported assertions of counsel are, therefore, insufficient to sustain the burden of proof.

9. familiarity with Microsoft Sharepoint, Cisco, Oracle and Unix is a plus
10. Excellent Organization and Technical Skills is [sic] required

The director denied the petition on October 7, 2006, finding, as was noted above, that the petitioner had not demonstrated that it would employ the beneficiary in a specialty occupation. More specifically, the director found that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, present counsel provided a substantially revised description of the duties of the proffered position, without explaining the source of that revised description that materially expanded the scope of the duties as described in the RFE response.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits approval of the visa petition. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The new description of the duties of the proffered position, submitted on appeal, will not be considered.

In the brief on appeal, present counsel asserted that the evidence provided is sufficient to show that the proffered position is a specialty occupation position, but without providing a concrete explanation of why the duties of the proffered position, or any one of them, require or requires a minimum of a bachelor's degree or the equivalent in a specific specialty.

The AAO will now address the additional, supplemental requirements of 8 C.F.R. § 214.2(h)(4)(iii)(A). It will first address the supplemental, alternative requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which is satisfied if the petitioner demonstrates that the proffered position is, for instance, a computer support specialist position and that a bachelor's or higher degree in a specific specialty or its equivalent is normally the minimum entry requirement for that particular position.

Who provided the description of the duties of the proffered position in response to the RFE is unknown. Further, consideration of the description of the duties provided in the instant case is complicated by the fact that some of the duties described involve rendering computer services to third parties. The proffered position, providing computer support for a real estate firm, clearly involves no such duties, and their inclusion in the description provided is troubling.

Nevertheless, those duties will be considered based on the assumption, *arguendo*, that they are the duties of the proffered position. The AAO notes, however, that if the visa petition were otherwise approvable, the petitioner would still be obliged to explain the inclusion of third-party computer support duties in the description, although they are clearly unrelated to the proffered position.

The AAO recognizes the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.² The *Handbook* chapter entitled Computer Support Specialists provides the following description of the duties of such positions:

Computer support specialists provide technical assistance, support, and advice to individuals and organizations that depend on information technology. They work within organizations that use computer systems, for computer hardware or software vendors, or for third-party organizations that provide support services on a contract basis, such as help-desk service firms. Support specialists are usually differentiated between technical support specialists and help-desk technicians.

Technical support specialists respond to inquiries from their organizations' computer users and may run automatic diagnostics programs to resolve problems. In addition, they may write training manuals and train computer users in the use of new computer hardware and software. These workers also oversee the daily performance of their company's computer systems, resolving technical problems with Local Area Networks (LAN), Wide Area Networks (WAN), and other systems.

The referenced section of the U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2010-11 ed., available at <http://www.bls.gov/oco/ocos306.htm> (last accessed November 11, 2011).

Those duties, overseeing the performance of computer systems, addressing problems, and providing assistance to computer users, closely correspond to the duties of the proffered position as described in the unsigned, unattributed description of the duties of the proffered position. The AAO finds that the description provided of the proffered position's duties describes a computer support specialist position.

The *Handbook* describes the educational requirements of computer support specialist positions as follows:

Due to the wide range of skills required, there are many paths of entry to a job as a computer support specialist. Training requirements for computer support specialist positions vary, but many employers prefer to hire applicants with some formal college education. A bachelor's degree in computer science, computer engineering, or information systems is a prerequisite for some jobs; other jobs, however, may require only a computer-related associate degree. Some employers will hire applicants with a college degree in any field, as long as the applicant has the necessary technical skills.

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

For some jobs, relevant computer experience and certifications may substitute for formal education.

The *Handbook* makes clear that computer support specialist positions do not categorically require any college education. It further makes clear that those positions that require some college may not require a minimum of a bachelor's degree. Further, it makes clear that those positions that require a bachelor's degree may not require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The *Handbook* provides no support for the proposition that a bachelor's or higher degree in a specific specialty or its equivalent is normally the minimum entry requirement for the particular position proffered in the instant case and the record contains no other evidence on that point. The petitioner has not, therefore, satisfied the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was observed above, the *Handbook* provides no support for the proposition that the petitioner's industry requires computer support specialists to possess a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no evidence pertinent to a professional association of computer support specialists that requires a minimum of a bachelor's degree or the equivalent in a specific specialty as a condition of entry. The record contains no letters or affidavits from others in the real estate business.

The vacancy announcement was placed by Honeywell International, which describes itself as a "\$36 billion diversified technology and manufacturing leader" Honeywell is clearly not in the real estate brokerage business. The announcement is for a Network & Data Management Support Specialist. The announcement contains a description of the duties of the position, but the duties described are not manifestly similar to the duties of the proffered position in the instant case, except that both positions are related to computers. That vacancy announcement, for both reasons, is not an announcement of a position parallel to the proffered position in the petitioner's industry.

Further, that announcement states that a "Bachelor's degree in computer science or a related engineering discipline is required" for that position. That a bachelor's degree in an unspecified

branch of engineering might satisfy the educational requirement of the position indicates that the position announced may not require a minimum of a bachelor's degree or the equivalent in a specific specialty and may not, therefore, be a specialty occupation position. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988). Therefore, it does not support the inference that the proffered position in the instant case, by some unspecified similarity to the position offered in that announcement, is a specialty occupation position.

Further still, even if the single vacancy announcement provided were for a parallel position at a similar real estate brokerage and unequivocally required a minimum of a bachelor's degree or the equivalent in a specific specialty, the submission of the one single announcement is insufficient to demonstrate an industry-wide requirement. The record contains no independent evidence that the announcement is representative of common recruiting and hiring practices for the proffered position in the petitioner's industry.

The record contains no evidence that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, satisfied criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The AAO will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the petitioner demonstrates that, notwithstanding that other computer support specialist positions in the real estate industry may not require a minimum of a bachelor's degree or the equivalent in a specific specialty, the particular position proffered in the instant case is so complex or unique that it can be performed only by an individual with such a degree.

The unsigned, unattributed description of the ostensible duties of the proffered position is the only evidence in the record that might have differentiated the proffered position as more complex or unique than other computer support specialist positions in the real estate industry.

In any event, that description appears to encompass only the generalized, generic duties of computer support specialists. Providing technical support, troubleshooting and diagnosing computer problems, installing programs, and modifying hardware and software, etc. appear to be within the ambit of an ordinary computer support specialist's expected duties, and the *Handbook* indicates that such positions do not categorically require a minimum of a bachelor's degree or the equivalent in a specific specialty. Absent any explanation of uniqueness or unusual complexity in those duties that would require a minimum of a bachelor's degree or the equivalent in a specific specialty, they do not show that the proffered position is so complex or unique that it can be performed only by an individual with a minimum of a bachelor's degree or the equivalent in a specific specialty. The petitioner has not, therefore, met the requirements of the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence that the petitioner has ever previously hired anyone to fill the proffered position, and the petitioner has not, therefore, provided any evidence for analysis under the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

Finally, the AAO will address the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent.

Again, however, the only evidence on that point is the unsigned, unattributed, description of the ostensible duties of the proffered position, at least some of which do not appear to pertain to that position. In any event, as was noted above, the proposed duties of the proffered position are presented in the record of proceeding in terms of generalized and generic functions. As so generally described, those proposed duties fail to convey that their performance would require application of a particular level of a body of highly specialized knowledge that is usually associated with attainment of a particular level of educational attainment in a specific specialty.

The petitioner has not demonstrated that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has not, therefore, demonstrated that the proffered position meets the requirements of the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the submission appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. The appeal will be dismissed and the petition denied.

ORDER: The appeal is dismissed. The petition is denied.